

DOCKET FILE COPY ORIGINAL

DOCKET FILE COPY ORIGINAL

RECEIVED

ROSENMAN & COLIN

1300 19TH STREET, N.W., WASHINGTON, D.C. 20036

TELEPHONE (202) 463-7177

TELECOPIER (202) 429-0046

JUL 14 1993

NEW YORK OFFICE
575 MADISON AVENUE
NEW YORK, NY 10022-2585
TELEPHONE (212) 940-8800

July 14, 1993

FEDERAL COMMUNICATIONS COMMISSION
SAMUEL I. ROSENMAN (1896-1973)
JEROLD L. COLIN (1900-1985)

SPECIAL COUNSEL
JEROLD L. JACOBS

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: **WLIG-TV, Inc.**
Station WLIG(TV), Riverhead NY
Petition for Rulemaking to Amend
Section 76.51(a)(1) of the Rules

Dear Mr. Caton:

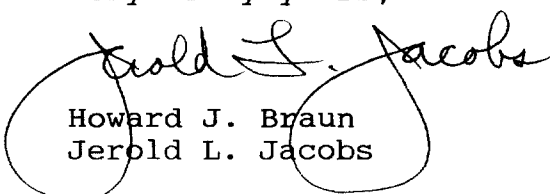
Enclosed for filing, on behalf of our client, WLIG-TV, Inc. ("WLIG"), licensee of Station WLIG(TV), Riverhead, New York, are an original and nine (9) copies of a "PETITION FOR RULEMAKING" ("Petition") which requests that §76.51(a)(1) of the cable television rules be amended by adding Riverhead to the New York, N.Y. - Linden-Paterson-Newark, N.J. major television market (#1).

WLIG's Petition is fully supported by established Commission case precedent, the Report and Order in MM Docket No. 92-259 (Broadcast Signal Carriage Issues) ("Carriage R&O"), 8 FCC Rcd 2965 (1993), and the new Note to §76.51 of the Rules, which recognize that revisions in the major market list via notice-and-comment rulemaking proceedings are appropriate on a case-by-case basis.

WLIG also requests expedited action on its Petition in accordance with Paragraph 50 of the Carriage R&O. Finally, WLIG believes that consolidation is warranted with another petition, recently filed by Mountain Broadcasting Corporation, permittee of Station WMBC-TV, Newton, New Jersey, which also requests amendment of Market #1, assuming that such consolidation does not interfere with the expeditious consideration of either Petition.

Please direct any inquiries or correspondence concerning this matter to the undersigned.

Very truly yours,


Howard J. Braun
Jerold L. Jacobs

Enc.

cc: Roy J. Stewart, Chief
William H. Johnson, Deputy Chief
Ronald Parver, Chief (ALL FCC - BY HAND - w/enc.)
M. Anne Swanson, Esq. (w/enc.)

No. of Copies rec'd
List A B C D E

0+9
MMB

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 14 1993

In the Matter of)
)
Amendment of Section 76.51(a)(1))
of the Commission's Rules to Include)
Riverhead, New York in the New York,)
N.Y. - Linden-Paterson-Newark, N.J.)
Major Television Market (#1))

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: Chief, Mass Media Bureau

PETITION FOR RULEMAKING

WLIG-TV, INC.

Howard J. Braun
Jerold L. Jacobs

ROSENMAN & COLIN
1300 - 19th Street, N.W.
Suite 200
Washington, D.C. 20036

Its Attorneys

Dated: July 14, 1993

Table of Contents

	Page
SUMMARY	iii
I. BACKGROUND	1
A. WLIG Serves the New York ADI	2
B. WLIG's Competitive Imbalance	3
II. AMENDING §76.51 TO ADD RIVERHEAD, NY AS A DESIGNATED COMMUNITY FULLY SATISFIES CASE PRECEDENT AND THE COMMISSION'S RULES	5
III. REQUEST FOR EXPEDITED ACTION AND CONSOLIDATION	14
IV. CONCLUSION	15

SUMMARY

In this Petition for Rulemaking, WLIG-TV, Inc. ("WLIG"), licensee of Station WLIG(TV), Riverhead, New York, requests that §76.51(a)(1) of the cable television rules be amended by adding Riverhead, New York to the New York, N.Y. - Linden-Paterson-Newark, N.J. major television market (#1) (the "New York - New Jersey" market).

Station WLIG(TV) (Ind., Channel 55) has been on the air since 1985 and is the only full-time independent commercial TV station licensed to a Long Island community. However, although Riverhead is part of the New York ADI, it is not currently a designated community in the New York - New Jersey market.

While WLIG operates in the largest TV market in the United States (ADI #1), its advertising base has continued to be local, with only nominal national advertising revenues, and its advertising revenues have remained virtually static since 1985. WLIG attributes this to a competitive imbalance within the New York ADI. With Riverhead not being a designated community in Market #1, WLIG cannot compete with the New York City TV stations for national advertising revenues, programming, and audience.

WLIG maintains that including Riverhead as a designated community in the New York - New Jersey market will cure this distorted competitive situation with the New York City TV stations, and is fully consistent with the Commission's recent Carriage Report and Order implementing the mandatory signal

carriage provisions of the 1992 Cable TV Act, and with established case precedent. By granting WLIG's hyphenation Petition, Station WLIG will be able to compete on an equal basis in Market #1 and ADI #1 for programming, national advertising, and audience.

WLIG is at a significant competitive disadvantage at the present time in these areas. Therefore, WLIG respectfully requests expedited action on its Petition. In addition, WLIG believes that consolidation is warranted with another rulemaking petition recently filed by Mountain Broadcasting Corporation, permittee of Station WMBC-TV, Newton, New Jersey, which also requests amendment of Market #1, assuming that such consolidation does not interfere with the expeditious consideration of either Petition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 14 1993

In the Matter of)

)
Amendment of Section 76.51(a)(1))
of the Commission's Rules to Include)
Riverhead, New York in the New York,)
N.Y. - Linden-Paterson-Newark, N.J.)
Major Television Market (#1))

RM-

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: Chief, Mass Media Bureau

PETITION FOR RULEMAKING

WLIG-TV, Inc. ("WLIG"), licensee of Station WLIG(TV), Riverhead, New York, by its attorneys, pursuant to §1.401 and the Note to §76.51 of the Commission's Rules, hereby requests that the list of designated communities of major television markets in §76.51 of the cable television rules be amended by adding Riverhead, New York to the existing New York, N.Y. - Linden-Paterson-Newark, N.J. major market (#1) (the "New York - New Jersey" market). In addition, expedited action on this Petition is respectfully requested. In support whereof, WLIG shows the following:

I. BACKGROUND

1. Station WLIG(TV) (Ind., Channel 55) began operations on April 28, 1985 in its community of license of Riverhead, New York. WLIG estimates that there are more than 3,500,000 persons within WLIG's predicted Grade B contour (see Exhibit 1 hereto), which encompasses all or part of the New York State counties of Nassau, Suffolk, Queens, Bronx, and

Westchester and parts of Connecticut. Furthermore, WLIG is the only full-time independent commercial TV station licensed to a Long Island community.¹ However, Riverhead is not currently a designated community in §76.51(a)(1) of the Rules -- the New York - New Jersey market -- and in this Petition, WLIG fully demonstrates why Riverhead should be added.

A. WLIG Serves the New York ADI

2. WLIG is part of the New York Area of Dominant Influence ("ADI"), as defined by Arbitron, for TV sales, promotion, audience measurement, and programming purposes. WLIG's economic base and its past, present, and future goals for its news and public affairs programming are ADI-wide in scope, encompassing the "tri-state" interests and concerns of New York, New Jersey, and Connecticut. The importance of a tri-state TV audience in the New York ADI is illustrated by the existence of many large regional tri-state corporations who seek to advertise in the ADI.

3. Since sign-on in 1985, WLIG's programming line-up has included original (self-produced) local news, local sports, and other feature programs of interest to the local communities it serves; syndicated programming such as game shows and situation comedies; and high quality full-length

¹ WLIG notes that Station WHSI(TV), Channel 67, Smithtown, New York, is also licensed to a Long Island community; however, WHSI is a 24-hour Home Shopping Network affiliate and a satellite of Station WHSE(TV), Newark, New Jersey (another Home Shopping Network affiliate).

motion pictures. WLIG fully intends to continue and expand its local and regional news coverage, assuming that it is successful in maintaining its must-carry cable carriage rights throughout the New York ADI². WLIG devotes a significant amount of air time daily to local, regional, and state-wide news coverage, and WLIG also runs a significant number of Public Service Announcements ("PSA's") which are locally produced and focus on the needs and interests of local and regional viewers. This includes a special series of children-oriented PSA's entitled "TV 55's Caring For Kids," which treat important safety, hygiene, and citizenship topics.

B. WLIG's Competitive Imbalance

4. Although WLIG operates in the largest TV market in the United States (ADI #1), its advertising has continued to

² As noted in Paragraph 37 of the Report and Order in MM Docket No. 92-259 (Broadcast Signal Carriage Issues) ("Carriage Report and Order"), 8 FCC Rcd 2965, 2975 (1993), the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992), provides that a local commercial television station is entitled to must-carry status on all cable systems located in the same ADI, as defined by Arbitron, as the station. Cablevision Systems Corporation ("Cablevision") operates 19 cable systems serving 161 communities in 10 of the 29 counties within the New York ADI. In a May 28, 1993 Petition for Special Relief, Cablevision concedes WLIG's right to must-carry status on 8 systems serving 103 communities in the New York counties of Nassau and Suffolk, but purports to seek exclusion of 58 communities (11 Cablevision systems) in the New York State counties of Kings, Bronx, Westchester, and Dutchess, the New Jersey counties of Bergen, Hudson, and Essex, and the Connecticut county of Fairfield from WLIG's television market. WLIG is vigorously challenging Cablevision's exclusion request in a separate Commission proceeding.

be local, with only nominal national advertising revenues. These advertising revenues have remained virtually static since 1985. WLIG attributes this to a competitive imbalance within the New York ADI. With Riverhead not being a designated community in Market #1, WLIG cannot compete with the New York City television stations for national advertising revenues.³ Thus, when national advertisers "buy" Long Island on broadcast TV, they do so by advertising on the New York City stations, whose Grade B contours paradoxically encompass much less of Long Island than WLIG does, rather than by advertising on WLIG. To appreciate this paradox, see Exhibit 1, which depicts the Grade B contours of WLIG and WCBS-TV - - the New York City station whose Grade B contour best covers Long Island. At a glance one can tell that WLIG's Grade B contour covers almost all of Nassau and Suffolk Counties, while WCBS-TV covers much less. Moreover, the Grade B

³ WLIG's Petition concerns the New York ADI as a whole and is not intended to address the issue of national and regional cable advertising on Long Island. On July 8, 1993, WLIG filed a civil antitrust complaint against Cablevision in the United States District Court for the Eastern District of New York (Case No. CV-93-3019). This lawsuit seeks to recover monetary damages from Cablevision and obtain injunctive relief against it arising out of Cablevision's illegal, anticompetitive, and monopolistic activities against WLIG. These activities have included failing to carry WLIG on various Cablevision cable systems for a number of years and monopolizing the market for TV advertising in Nassau and Suffolk Counties. In addition, on July 7, 1993, WLIG filed a formal Complaint with the Commission alleging that at the present time Cablevision is extensively violating the Commission's must-carry cable rules vis-a-vis WLIG on its Long Island cable systems.

contours of the Riverhead and New York stations overlap in almost all of Nassau County and half of Suffolk County.

5. As WLIG will now show, equalizing competition between WLIG and the New York City TV stations requires having WLIG's city of license (Riverhead) recognized as a designated community within the New York - New Jersey market. This rule amendment will not only allow Station WLIG to compete on an equal basis in Market #1 and ADI #1 for programming, national advertising, and audience, but, most importantly, from a public interest standpoint, it will also permit the viewing public to benefit from greater program diversity.

**II. AMENDING §76.51 TO ADD RIVERHEAD, NY
AS A DESIGNATED COMMUNITY FULLY SATISFIES
CASE PRECEDENT AND THE COMMISSION'S RULES**

6. When the Commission adopted its multi-faceted cable television regulatory program of the 1970's in the Cable Television Report and Order ("CTRO"), 36 FCC 2d 143 (1972), it adopted a list of 100 major television markets (§76.51), which included a number of "hyphenated markets," such as the New York - New Jersey market. The CTRO, 36 FCC 2d at 176 ¶87, specifically discussed the rationale underlying the use of hyphenated markets in the Commission's program for mandatory carriage of local television signals and stated (emphasis added):

In such [hyphenated] markets, characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different cities within the market area,

we will... require carriage of all stations licensed to designated communities in the market. Because of the structure of these markets, including the terrain and population distribution, portions of the market are occasionally located beyond the Grade B contours of some market stations. Consequently, we are adopting this rule in order to help equalize competition between stations in markets of this type, and to assure that stations will have access to cable subscribers in the market and that cable subscribers will have access to all stations in the market.

Thus, the Commission emphasized the goal of using hyphenated markets to "equalize competition" and to assure cable carriage of all stations in geographically extended television markets where there is more than one major population center supporting the market stations and portions of the market are located beyond the Grade B contours of some market stations. These standards have been elaborated in subsequent hyphenated market cases and in the Carriage R&O, which fully support WLIG's Petition.

7. In 1985, the Commission issued its most comprehensive §76.51 adjudication to date, Amendment of Section 76.51 (Orlando-Daytona Beach, Melbourne, and Cocoa, FL) (the "Orlando, Florida" case), 102 FCC 2d 1062 (1985). There, relying on Television Muscle Shoals, 48 RR 2d 1191 (1980), recon. denied, 87 FCC 2d 507 (1981), the Commission enunciated four factors for determining whether an additional community should be designated as part of a major market (102 FCC 2d at 1073):

(1) the distance between the proposed community and existing designated communities; (2) whether most of the area where a station licensed to the proposed

community would be afforded expanded carriage rights lies beyond its Grade B contours; (3) the presence of a clear showing of particularized need by a station requesting a change of designation; and (4) an indication of benefit to the public from the proposed change.

Using these factors, the Commission concluded in the Orlando, Florida case that Melbourne and Cocoa both qualified for inclusion in the Orlando - Daytona Beach market (#55).

8. Applying the four Orlando, Florida criteria to Riverhead and the New York - New Jersey market, WLIG maintains that Riverhead is clearly entitled to be treated with the New York and New Jersey communities as comprising a single TV market. Addressing the Orlando, Florida criteria seriatim:

(1) The distance between the proposed community and existing designated communities

As Exhibit 1 shows, the 35-mile zone of WLIG intersects the 35-mile zone of the New York City TV stations. The New Jersey reference points are slightly west and southwest of the New York point, and Exhibit 2 shows that the 35-mile zone for Station WNJU(TV), Linden, New Jersey falls about 14 miles short of the WLIG 35-mile zone. As in the Orlando, Florida case, the Riverhead 35-mile zone intersects at least one other designated community's 35-mile zone, but the zones of the communities at the extreme ends of the market (Daytona Beach and Melbourne, and Riverhead and the

three New Jersey designated communities) do not intersect.⁴

- (2) Whether most of the area where a station licensed to the proposed community would be afforded expanded carriage rights lies beyond its Grade B contours

Since WLIG's mandatory cable carriage rights derive from its location within the New York ADI -- not from the proposed hyphenation (see footnote 2) -- the addition of Riverhead as a designated community will not increase WLIG's cable carriage rights beyond what the Rules already permit.

Nonetheless, reference to WLIG's Grade B contour remains relevant to show how WLIG competes with other stations. Exhibits 1 and 2 juxtapose the Grade B contours of WLIG and WCBS-TV (as a representative New York City Station) and WNJU(TV) (as a representative New Jersey station). The maps show that the Grade B contour of WCBS-TV reaches within 10 miles of Riverhead, and WLIG's Grade B contour encompasses a section of the

⁴ WLIG recognizes that 35-mile zones are no longer used in the Commission's signal carriage rules. However, the zones are a useful gauge of mileage and proximity amongst designated communities within a market -- factors which the Orlando, Florida case, 102 FCC 2d at 1072-74 and n.7, deemed important in evaluating market amendment requests. See also the discussion about potential copyright liability in (3) below, where 35-mile zones are still used.

Borough/County of Queens, which is part of New York City.

The maps also show that, at least as to the New York State counties of Nassau, Suffolk, Queens, Bronx, and Westchester, much of the area in which WLIG would benefit as a result of hyphenation (see (3) below) lies within its Grade B contour and the overlapping Grade B contours of the New York City stations. In the Orlando, Florida case, the Commission held that such overlapping Grade B contours help demonstrate that the stations involved are component parts of the same TV market because "television stations...rely on the area within their Grade B contours for economic support". 102 FCC 2d at 1070.

(3) The presence of a clear showing of particularized need by a station requesting a change of designation

WLIG's "particularized need" for relief is based on the showing made in this Petition that while WLIG's service area is an integral part of the New York ADI, WLIG cannot presently compete on an equal basis for programming, national advertising, and audience with the New York City stations because Riverhead is not recognized as being part of Market #1 or ADI #1.

The Long Island coverage areas of the New York City stations largely overlap WLIG's coverage area, and WLIG

covers much more of Long Island than the New York City stations do, but WLIG receives hardly any portion of the national advertising purchased on broadcast television in the New York ADI. These inequities are exactly what the Commission has sought to cure via market hyphenations.

Thus, WLIG faces the same "need" that was recognized by the Commission in the Orlando, Florida case, 102 FCC 2d at 1073-74, as warranting designation of Melbourne and Cocoa as major market communities -- namely, overcoming the competitive disadvantage that WLIG faces because its present market designation is not commensurate with its coverage area and its physical and economic location within the New York - New Jersey major market and the New York ADI.

Further, the addition of Riverhead to the New York -New Jersey market will resolve a substantial problem created by the different regulatory schemes for must-carry rights and program exclusivity. As recognized by the Commission in Paragraph 51 of the Carriage R&O, supra, 8 FCC Rcd at 2978, there may be instances in which a station having must-carry rights on a cable system may be subject to exclusivity blackouts in favor of another must-carry station on the same system. This is exactly the situation WLIG now faces vis-a-vis the New York City stations.

Because Riverhead is more than 35 miles away from New York City, WLIG cannot buy exclusive programming rights against the New York City stations, and vice-versa. This means that on systems inside the New York City 35-mile zone, a New York City station will be entitled to syndicated program exclusivity protection (assuming it has bargained for it) against duplicative syndicated programming broadcast by WLIG, even though both stations have must-carry rights on those systems and are therefore entitled to full-time carriage.⁵ By adding Riverhead to the New York - New Jersey market, the Commission will allow WLIG to purchase exclusive programming rights against the New York City stations and thereby eliminate the potential for syndicated exclusivity blackouts between must-carry stations.

An additional potential "need" of WLIG is relief from onerous copyright liability in certain cable communities in which Station WLIG is currently deemed to be a distant signal under the cable compulsory copyright license, 17 U.S.C. §111, even though it is a must-carry station, because Riverhead is not a designated community in the New York - New Jersey major market. In those instances, where a cable system is located within the

⁵ By contrast, WLIG will not enjoy such rights against most of the New York City stations on cable systems located inside the Riverhead 35-mile zone, since most New York City stations are "significantly viewed" in Suffolk County.

New York ADI but beyond Riverhead's 35-mile zone, WLIG(TV) ceases to be a must-carry station unless it agrees to indemnify said cable system for any increased copyright liability resulting from carriage on that system. See §76.55(c)(2) of the Rules. However, WLIG's proposed amendment of §76.51 may result in Station WLIG being treated by the Copyright Office as a local signal, so that its carriage does not cause copyright liability. Compare Policy Decision Concerning FCC Action Amending List of Major Television Markets, 52 Fed. Reg. 28362 (1987) with Copyright Office's Notice of Inquiry in Docket No. RM 93-5, 58 Fed. Reg. 34594 (1993).

(4) An indication of benefit to the public from the proposed change

As in the Orlando, Florida case, 102 FCC 2d at 1074, the special "benefit to the public" that will be gained if Riverhead is included in Market #1 flows from the fact that WLIG is an independent TV station. The Commission correctly postulated in Orlando, Florida, supra that an independent station has greater programming latitude than network affiliates. WLIG has described above how grant of its Petition will enable it to increase substantially its news, public affairs, and other non-entertainment programming, "thereby providing a public benefit" (id.) to its viewing audiences throughout Market #1. WLIG urges that this anticipated

public benefit clearly warrants favorable Commission action here.

9. The addition of Riverhead as a designated community within the New York - New Jersey market is further supported by the Carriage R&O, 8 FCC Rcd at 2978 ¶50, and the new Note to §76.51 of the Rules, which recognize that revisions in the major market list via notice-and-comment rulemaking proceedings are appropriate on a case-by-case basis and that the decisional standard should be "commonality between the proposed community to be added to a market designation and the market as a whole". Id. WLIG submits that the Commission's previous hyphenated market cases -- especially the Orlando, Florida case -- provide the appropriate evidentiary criteria for this newly-phrased test and continue to be fully relevant in the decisionmaking process.

10. Indeed, the Commission's May 19, 1993 Report and Order in MM Docket No. 92-306, DA 93-579, which was decided post-Carriage R&O, effectively applied the Orlando, Florida criteria. There, the Commission held that Clermont, Florida should be added to the designated communities of the Orlando-Daytona Beach-Melbourne-Cocoa, Florida major market in §76.51(a)(55). In so concluding, the Commission noted (at ¶3) that the Clermont station seeking hyphenation and the other market stations: (1) have coverage areas that substantially overlap; (2) the stations do, in fact, compete for audiences throughout the market area, thus establishing

their economic interdependence; (3) Clermont is within the Orlando-Daytona Beach-Melbourne ADI; and (4) "sufficient competitive commonality [exists] such that the proposed market redesignation appropriately delineates the areas where market-area stations can and do, both actually and logically, compete". WLIG submits that these findings comport with the new Carriage R&O standard and also with previous hyphenation criteria. Most importantly, WLIG's hyphenation proposal is fully consistent with both bodies of law.

III. REQUEST FOR EXPEDITED ACTION AND CONSOLIDATION

11. As noted above, WLIG is at a significant competitive disadvantage at the present time with respect to program acquisition, national advertising, and audience. A change in its competitive posture vis-a-vis the New York City television stations is required. Therefore, WLIG respectfully requests expedited action on this Petition in accordance with Paragraph 50 of the Carriage R&O, supra, 8 FCC Rcd at 2978.

12. In this connection, WLIG is aware that on June 14, 1993, Mountain Broadcasting Corporation, permittee of Station WMBC-TV, Newton, New Jersey, also filed a Petition for Rule-making which requests amendment of the New York - New Jersey major market. WLIG believes that consolidation of the two petitions into the same proceeding is warranted, because of the similarities presented, assuming that such consolidation

does not interfere with the expeditious consideration of either Petition.

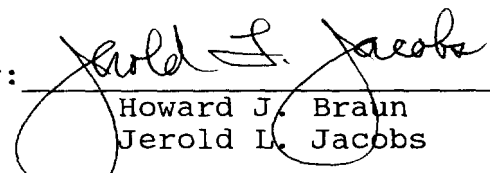
IV. CONCLUSION

13. In this Petition, WLIG has shown that its ability to compete effectively and its programming ability to serve its entire market are hindered by present §76.51(a)(1) of the Rules, which does not include Riverhead as a designated community in Market #1. In light of past Commission precedents, the Carriage R&O, and the unambiguous facts of this case, WLIG respectfully urges that an expedited rulemaking proceeding and the addition of Riverhead to the New York - New Jersey major market are required by the public interest.

WHEREFORE, in light of the foregoing, WLIG-TV, Inc. respectfully requests that the Commission should amend §76.51(a)(1) of the Rules and should grant expedited action on this Petition.

Respectfully submitted,

WLIG-TV, Inc.

By: 
Howard J. Braun
Jerold L. Jacobs

ROSENMAN & COLIN
1300 - 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 463-7177

Its Attorneys

Dated: July 14, 1993

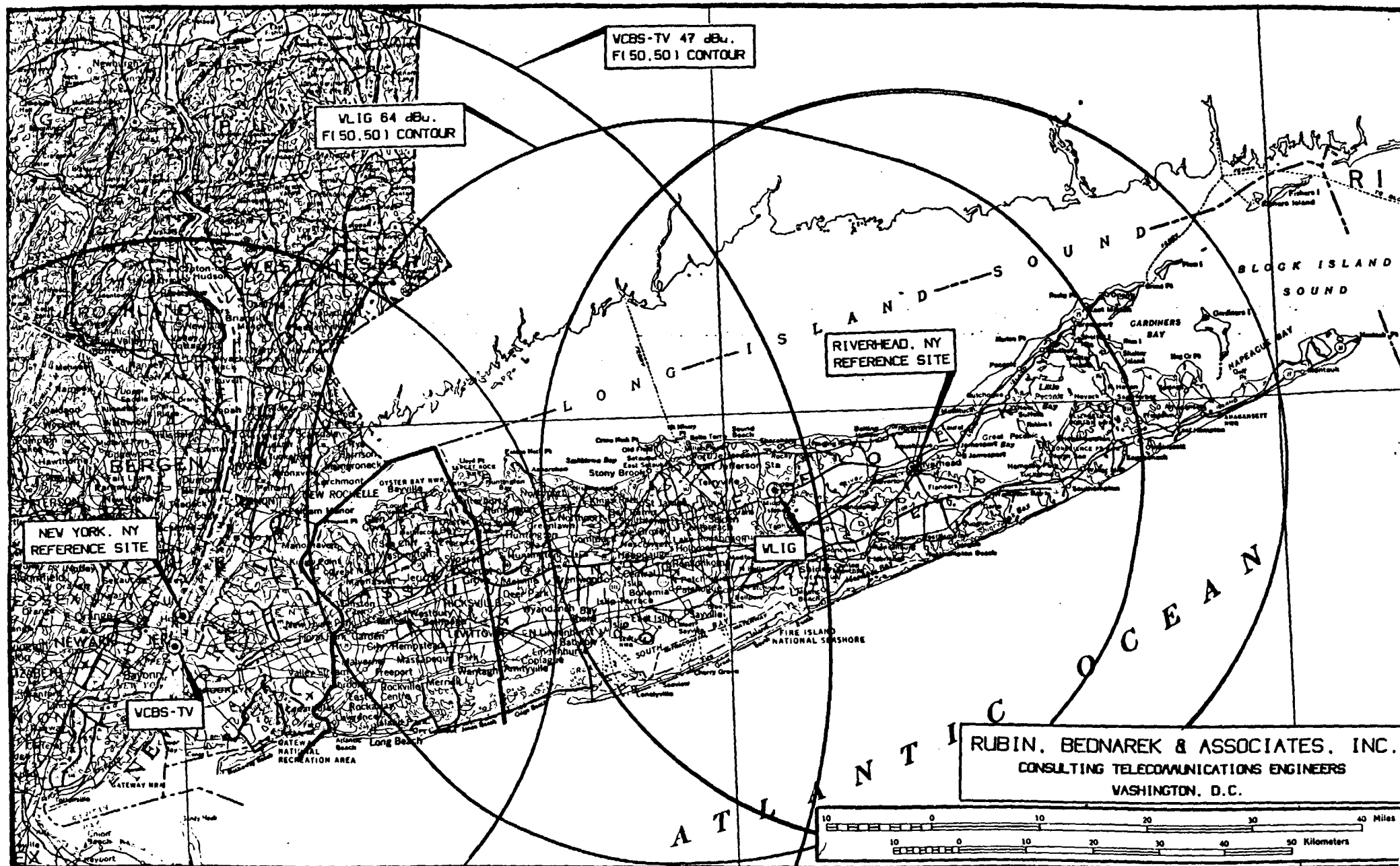


EXHIBIT 1

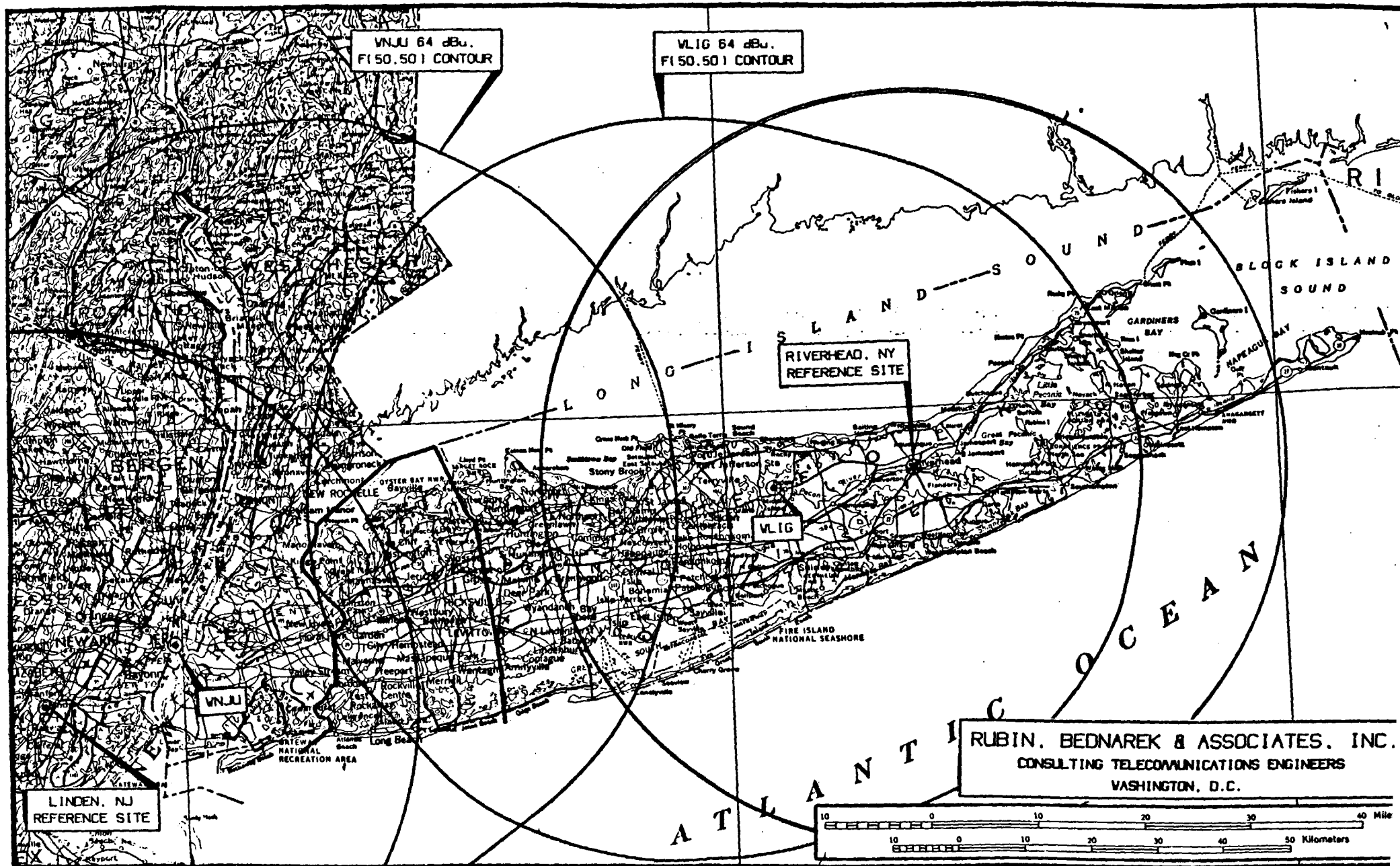


EXHIBIT 2